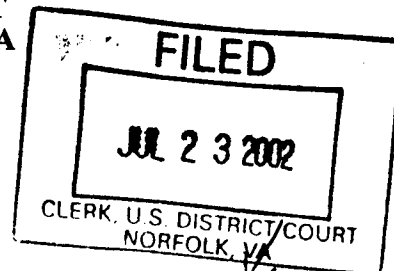


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION



YASER ESAM HAMDI,
ESAM FOUAD HAMDI, As Next
Friend of Yaser Esam Hamdi,

Petitioners,

v.

CASE NO. 2:02CV439

DONALD RUMSFELD
Secretary of Defense

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig

Respondents.

**PETITIONER'S RESPONSE TO RESPONDENTS' REFUSAL TO FILE RULE 26
DISCLOSURES**

Respondents assert three reasons for violating this Court's Order to provide discovery pursuant to Federal Rule of Civil Procedure 26: (1) the Court lacks jurisdiction to order discovery pending the issuance of the mandate from the Court of Appeals; (2) Rule 26 does not apply to habeas proceedings; and (3) the Court's discovery Order is premature. These arguments establish that Respondents not only seek to frustrate the prompt resolution of the underlying claims, but also that they have little understanding of this Court's jurisdiction and its power to fashion appropriate means of discovery in habeas proceedings.

I. The Court Possesses Jurisdiction Because the Court's Discovery Order Has Nothing To Do With Access to Petitioner Hamdi

Respondents maintain that this Court lacks jurisdiction because the Court of Appeals for the Fourth Circuit has yet to issue its mandate in Respondents' interlocutory appeal of this Court's June 11, 2002, Order. Respondents are wrong.

Respondents' Notice of Appeal of the Court's June 11, 2002, Order divested this Court of jurisdiction only "over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58-59 (1982) (per curiam); accord *Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996) ("Although the filing of a notice of appeal ordinarily divests the district court of jurisdiction over issues decided in the order being appealed, jurisdiction is retained where, as here, the appeal is from an order granting or denying a preliminary injunction."); *Railway Labor Exec. Assoc. v. City of Galveston*, 898 F.2d 481, 481 (5th Cir. 1990) ("the pendency of the interlocutory appeal from the district court's judgment denying the preliminary injunction did not divest the district court of jurisdiction to proceed with other aspects of the case"). And, as evidenced by the Fourth Circuit's July 12, 2002, decision, the conduct of discovery was not before the court on appeal.

Rather, the court of appeals addressed the propriety of access by counsel to an individual Respondents claim is an "enemy combatant." *Hamdi v. Rumsfeld*, 4th Cir. No. 02-6895, slip. op. at 3 ("we reverse the court's June 11 order mandating access to counsel and remand the case for proceedings consistent with this opinion"); *id.* at 15 ("we reverse the court's June 11 order mandating access to counsel and remand the case for proceedings consistent with this opinion"). Accordingly, the fact that the mandate has yet to issue in that appeal has nothing to do with this Court's jurisdiction to address the conduct of discovery, or any other matter unrelated to the appeal.

"For most purposes, the entry of judgment, rather than the issuance of the mandate, marks the effective end to a controversy on appeal." *Finberg v. Sullivan*, 658 F.2d 93, 97 n.5 (3d Cir. 1980) (en banc); accord *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989). Indeed, the

issuance of a mandate is a largely “ministerial function” that is immaterial to the merits of the case. *See In re Chambers Dev. Co.*, 148 F.3d 214, 224 n.8 (3d. Cir. 1998) (issuance of the mandate is “largely a ministerial function” that is “wholly separate from . . . the merits.”).

Moreover, the rule that a district court lacks jurisdiction over the aspects of a case involved in an appeal pending the issuance of the mandate is simply a “judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having *the same issues* before two courts at the same time.” *United States v. Montgomery*, 262 F.3d 233, 239-40 (4th Cir. 2001) (emphasis added). In other words, “[t]he mandate rule prevents the waste of judicial resources that might result if a district court, prior to the issuance of the appeals court’s mandate, proceeds with a case, ruling on motions and hearing evidence, after which the appeals court reverses its original decision on rehearing.” *United States v. DeFries*, 129 F.3d 1293, 1303 (D.C. Cir. 1997). The mandate rule has no application to this Court’s discovery order because the conduct of discovery was not at issue on appeal. Consequently, even if the appeals court were to reverse its decision regarding access to Petitioner Hamdi on rehearing, this Court’s Order regarding discovery would be unaffected.

Kusay v. United States, 62 F.3d 192 (7th Cir. 1995), cited by Respondents, is inapposite. In *Kusay*, before the issuance of the appeals court’s mandate, the district court proceeded to hold a hearing on the very issue that was before the court of appeals. *Id.* at 194. Likewise, in *United States v. Montgomery*, 262 F.3d 233 (4th Cir. 2001), the district court proceeded to trial notwithstanding the pendency of an interlocutory appeal challenging the denial of a motion to dismiss the indictment on double jeopardy grounds. While the Fourth Circuit concluded that the district court had jurisdiction under the “dual jurisdiction” rule authorizing trial courts to proceed in certain circumstances while a double jeopardy claim is on appeal, *Montgomery* has no application to circumstances in which a district court rules on matters that are not before the court of appeals in an interlocutory appeal.

Of course, the Fourth Circuit entered a stay of all proceedings in this Court pending resolution of the appeal. *Hamdi v. Rumsfeld*, 4th Cir. No. 02-6895 (June 14, 2002). But the

appellate court's stay dissolved automatically upon issuance of the court's judgment. *See FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) ("The injunction pending the appeal expires by its own terms upon disposition of the appeal."); *see also United States v. Nat'l Bank*, 620 F.2d 193, (8th Cir. 1980) ("this court's affirmance of the district court order enforcing the summons dissolves the stay" issued pending appeal); *Atlas Copco, Inc. v. EPA*, 642 F.2d 458, 470 (D.C. Cir. 1979) ("a stay issued pursuant to Federal Rule of Appellate Rule 8(a) dissolves automatically upon resolution of the appeal."); *In re James River Assocs.*, 148 B.R. 790, 798 (E.D. Va. 1992) ("a stay pending appeal dissolves when the appeal is decided"). With the exception of access by counsel to Petitioner Hamdi, this Court therefore possesses jurisdiction to issue rulings in this proceeding on all matters.

II. The Court Properly Required Discovery Pursuant to Federal Rule of Civil Procedure 26

Respondents also argue that Federal Rule of Civil Procedure 26(a)(1) initial disclosures are not required in habeas proceedings. *See* Fed. R. Civ. P. 26(a)(1)(E)(ii). Respondents ignore the Court's power to require such disclosures as "directed by order." Fed. R. Civ. P. 26(a)(1).

Rule 26(a)(1)(E)(ii) exempts from the initial disclosure requirements proceedings involving "a petition for habeas corpus or other proceeding *to challenge a criminal conviction or sentence.*" Fed. R. Civ. P. 26(a)(1)(E)(ii). By its own terms, this language does not apply to this case. More importantly, Rule 26 expressly recognizes the Court's power to order such disclosures in any appropriate case. Specifically, Rule 26(a)(1) provides that "[e]xcept in categories of proceedings specified in Rule 26(a)(1)(E), *or to the extent otherwise stipulated or directed by order*, a party must, without awaiting a discovery request, provide" initial disclosures to other parties. Fed. R. Civ. P. 26(a)(1). The Court therefore acted well within its discretion in ordering such disclosures in this case.

In fact, federal courts have long relied upon civil discovery rules in habeas corpus proceedings. Before the promulgation of the Rules Governing § 2254 and § 2255 Cases, the

Supreme Court explained:

[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the “usages and principles of law.”

Harris v. Nelson, 394 U.S. 286, 301 (1969). The power to “fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage,” “is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.” *Id.* at 299.

The Rules Governing § 2254 and § 2255 cases are “meant to be ‘consistent’ with *Harris*.” *Bracy v. Gramley*, 520 U.S. 899, 909 (1997). Accordingly, those Rules note that courts may invoke “the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law” in appropriate cases. Rules Governing § 2254 Cases 6(a); Rules Governing § 2255 Cases 6(a). These Rules make “clear that the scope and extent of such discovery is a matter confided to the discretion of the District Court.” *Bracy*, 520 U.S. at 909.

There is little question that the facts in this case may establish the illegality of Petitioner Hamdi’s imprisonment by Respondents. *See* 18 U.S.C. § 4001(a) (“No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress”); *accord Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that the [Due Process] Clause protects. . . . And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate constitutional protections”). The Court’s discovery order therefore is perfectly appropriate.

Respondents also contend, however, that the Court’s Order requiring disclosures is “premature” because the disclosures were due before Respondents are required to file their Answer

and before the due date to challenge the Court's appointment of counsel. Respondents remain free, however, to file their Answer or other pleadings before the date required by the Court. More importantly, the Court has broad discretion to manage the conduct of the proceedings before it. Indeed, "the very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291. In sum, the Court's discovery Order contravenes neither the Federal Rules nor the Fourth Circuit's ruling on the issue of access to Petitioner Hamdi.

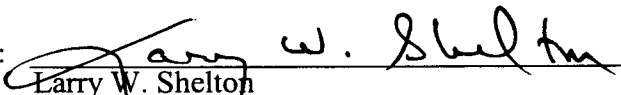
III. Conclusion

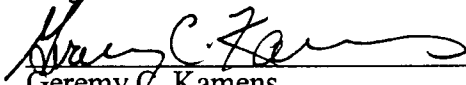
"There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris*, 394 U.S. at 292. Petitioner therefore respectfully requests that the Court require Respondents to submit discovery in accordance with this Court's Orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of July, 2002, a copy of the foregoing was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division, World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510.


Jeremy C. Kamens
Assistant Federal Public Defender